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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

FRANCIS J. LOFTUS

V.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY; TRANSPORT WORKERS UNION OF PHILADELPHIA, LOCAL 234, TRANSPORT WORKERS UNION OF AMERICA/AFL-CIO

H. FRANCIS DELONE, JR. and
FRANCIS J. LOFTUS,

Petitioners

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Attorney for Petitioners

## QUESTIONS PRESENTED FOR REVIEW

1. Whether, in the absence of any clear waiver of the right to bring such a suit, a union member must try to compel arbitration under a collective bargaining agreement before bringing a suit under § 1983.

2. Whether in order to avoid sanctions under 28 U.S.C. § 1927 an attorney must abandon a client and withdraw the client's lawsuit whenever an adverse and arguably controlling decision is issued by an appellate court.

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## STATEMENT OF JURISDICTION

The Opinion of the United States Court of Appeals for the Third Circuit, affirming the district court's Orders granting summary judgment to defendants and imposing § 1927 sanctions on plaintiffs counsel, was entered on April 13, 1999.

The appellate court's Order denying plaintiff's petition for rehearing was entered on May 10, 1999,

This Court has jurisdiction to review this final decision of the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1254(1).

## CITATIONS OF OPINIONS AND ORDERS

The unreported April 13, 1999 Opinion[1] of the United States Court of Appeals for the Third Circuit, affirming the district court's Orders granting summary judgment to defendants and imposing § 1927 sanctions on plaintiff's counsel, appears at pages Al to A19[2] of the Appendix. This case was assigned Docket Numbers 98-1114, 98-1435, 98-1530, and 98-1664 in the Court of Appeals.

The unreported Order of the United States District Court for the Eastern District of Pennsylvania, which granted summary judgment to defendants and was entered January 14, 1998, appears at pages A20 to A22 of the Appendix. This case was assigned Docket Number 93-2471 in the District Court.

The District Court Opinion and Order imposing § 1927 sanctions on plaintiffs counsel, appears at pages A23 to A31 of the Appendix. This Opinion and Order is reported at 8 F.Supp. 2d 458

The Order of the Court of Appeals denying a Petition for Rehearing, which was entered on May 10, 1999, appears at pages A32 to A33 of the Appendix.

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[1] Although not reported, the Third Circuit's Opinion is readily available through computer services such as Westlaw and therefore is capable of creating as much confusion and lack of uniformity of decisions as a reported opinion.

[2] "A#" designations refer to the Appendix to this Petition.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

### 1. Facts

On May 10, 1991, defendant Southeastern Pennsylvania Transportation Authority ("SEPTA") required plaintiff, who at that time was employed by SEPTA as a bus driver, to undergo testing designed to detect the presence of alcohol or controlled substances. Although in the Affidavit he filed with the District Court Mr. Loftus swore that he was not inebriated or otherwise under the influence of alcohol at the time of the test, SEPTA reported that the test was positive for alcohol. On the basis of the charge that the test was positive for alcohol, SEPTA fired plaintiff.

Since he was convinced that the reportedly positive result was wrong and he wanted a confirmatory test done, on the same day that the test was performed and just shortly after he learned that the test was reportedly positive for alcohol, plaintiff offered to allow SEPTA to take a blood sample. Although Section 15 (b) of SEPTA's drug testing program expressly gave each employee a right to have confirmatory testing done by an accredited, independent laboratory if he or she disagreed with a reported test result, SEPTA rejected plaintiff's request to have such testing done.

Mr. Loftus pursued a grievance with respect to his discharge in which he was represented by his union, defendant Local 234 of the Transport Workers Union of Philadelphia ("Local 234"). When he talked to his union representatives about his discharge and the alcohol testing, Mr. Loftus-who at the time was not aware of his right to have a confirmatory test done-told the union representatives about his request

to have such testing done and SEPTA's denial of his request. Local 234, however, never advised Mr. Loftus of his right to have such testing done, and in the grievance proceedings the union never raised the issue of SEPTA's improper refusal to allow such testing , even though-as a SEPTA management employee admitted in a deposition in this case-a reportedly positive drug or alcohol test may not be considered valid and is not grounds for discharge if the testing was not performed in accordance with the procedures in the drug and alcohol testing program.

The perfunctory grievance proceedings, during which no consideration was given to SEPTA's refusal to allow any confirmatory testing, resulted in the affirmance of SEPTA's discharge of plaintiff.

**11. Nature of Case and Proceedings**

This action was brought under 42 U.S.C. § 1983 seeking damages for defendants' violations of plaintiff's constitutional right to due process of the law in connection with their failure to give him a fair hearing in the grievance of his discharge.[3] In his Amended Complaint, plaintiff described the grievance procedure as a sham and asserted that SEPTA and Local 234 had acted in concert to make it so.

In February of 1996, both defendants filed motions for summary judgment in which both claimed that summary judgment was warranted pursuant to the Third Circuit's decision in *Dykes v. Southeastern Pa. Transp. Authority*, 68 F.3d 1564 (3d Cir. 1995), *cert. denied*, _ U. S. _, 116 S. Ct. 1434 (1996), a case that was decided in November of 1995. On March 12, 1996, plaintiff filed a memorandum in opposition

[3] In relevant cases, SEPTA, a state agency, has been held to act under color of state law, and SEPTA employees have been held to have a property interest in their jobs.

to defendants' summary judgment motions in which he argued, among other things, that *Dykes* was not controlling. [I]n April of 1996, the District Court, with the agreement of the parties, entered an Order staying all proceedings in this case "pending disposition of a related action" and placing this action in the Civil Suspense File.[4] The related action was not *Dykes* but was the case of *Barnes, et al. vs. SEPTA, et al.* (Civil Action No. 933644 in the United States District Court for the Eastern District of Pennsylvania), a case in which an appeal was then pending.

On January 14, 1998, almost two years after defendants had filed their summary judgment motions but just shortly after the case, with the agreement of all parties, was removed from the Civil Suspense File, the District Court entered an Order granting summary judgment to defendants. In so doing, the District Court held:

> Because there is no genuine issue of material fact as to whether plaintiff requested a court of common pleas to order arbitration, and because under the teachings in Dykes, defendants are entitled to judgment as a matter of law, summary judgment must be entered in favor of defendants.

The District Court did not even suggest that the collective bargaining agreement contained any waiver of the right of union members to pursue actions under § 1983. On February 3, 1998, plaintiff filed a Notice of Appeal from the January 14 Order,

Shortly after the District Court granted summary judgment to defendants, they both filed motions seeking awards of attorneys' fees under 42 U.S.C. § 1988, asserting that the action was frivolous. Neither filed any motion to have sanctions imposed on plaintiff's counsel with their motions seeking fees. On February 17, 1998, the District

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[4] When they are in the Civil Suspense File , cases are essentially inactive.

Court entered an Order denying defendants' motions for awards of attorney's fees under 42 U.S.C. § 1988. (Id.) In a footnote to the Order, the court stated:

> Certiorari was denied on April 15, 1996 [ in the Dykes case] 116 S.Ct. 1434. At that point, any further litigation by plaintiff in the instant case became frivolous.
>
> While the Court finds that plaintiff's lawsuit became frivolous after April 15, 1997 [sic], it cannot find that the plaintiff knew or should have known that his claim had no legal basis. While the plaintiff's attorney, Mr. deLone, either knew or should have known that the plaintiff's claim no longer had merit, his knowledge cannot be attributed to his client. In the absence of evidence that plaintiff knew or should have known the legal deficiency of his claim, an award of attorney's fees is inappropriate.
>
> Having now analyzed the issue of frivolity, the Court is troubled by Mr. deLone's actions and the effect of those actions on public interests.... Once the exact claim was rejected by the highest court in the land in the Dykes case, Mr. deLone had an obligation to withdraw this case. Therefore, the Court will consider by way of separate proceedings whether sanctions against Mr. deLone are warranted.

On the same day, the lower court issued an Order directing Mr. deLone to show cause why

> he should not be sanctioned, pursuant to Rule 11 of the Federal Rules of Civil Procedure or 28 U.S.C, § 1927 or the Court's inherent power ... for pursuing the above captioned case after April 15, 1997 [sic]...

In response, Mr. deLone filed a Memorandum in which he pointed out:

> In this case, the only signed pleading Mr. deLone presented after the April 15, 1996 denial of certiorari in the *Dykes* case was the memorandum he filed, with th[e trial] court's permission, in which he explained that the decision in the Barnes case was not controlling in this action because of

> factual differences between *Barnes* and the present case. Th[e trial] court has not suggested, and there is no reason for anyone to suggest, that Mr. deLone acted in bad faith when he filed this memorandum.

On May 8, 1998, the District Court issued an Order imposing sanctions against Mr. deLone on the basis of the court's assertion that Mr. deLone had violated 28 U.S.C. § 1927. Abandoning the theory of its February 17 Order that Mr. deLone may have acted in bad faith by continuing to pursue this matter after the Supreme Court's April 15, 1996 denial of certiorari in the *Dykes* case, the lower court stated:

> A number of factors serve to convince the Court that the continuing prosecution of this case by Mr. deLone, **once the Third Circuit had decided the *Dykes* case** [in November of 1995], was in willful bad faith.[5]

(A27)

The May 8 Order directed Mr. deLone to pay a total of $ 4,000 in sanctions to defendants within ten days. Mr. deLone filed a timely appeal from that Order.

In the brief in the consolidated appeal of the District Court orders granting summary judgment and imposing sanctions on his counsel, plaintiff argued:

> The lower court's summary judgment holding is also in direct conflict with several decisions in which the Supreme Court has held that individuals have the right to have the courts, rather than grievance/arbitration panels, resolve issues raised in actions asserting claims under 42 U.S.C. § 1983 and various other federal statutes, See, e.g., *McDonald v. City of West Branch*, 466 U.S. 284 (1984); *Barrentine v.*

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[5] Had he known initially that the District Court thought that this action became frivolous in November of 1995 when *Dykes* was decided, he could have responded to the court's show cause order by showing the absence of any substantial activity in this case by him during the relevant time period.

*Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

(A39) The Court of Appeals, however, disagreed and held:

> Despite Loftus' claims to the contrary, Dykes clearly controls and mandates summary judgment for the defendants. In Dykes we held that where
>
> > a plaintiff alleges that the defendants acted in concert to deprive him of a meaningful hearing and of arbitration [6], we believe that the administrative process in place has incorporated safeguards adequate to resolve these allegations in a manner consistent with the demands of due process. Significantly, Dykes could have asked a court of common pleas to order arbitration pursuant to the collective bargaining agreement, thereby assuring him of the due process to which he was entitled. Because he chose not to do so, Dykes is unable to prove a violation of 42 U.S.C. § 1983 by SEPTA or Local 234.

(A8) The Court of Appeals did not even suggest that the collective bargaining agreement contained any waiver of the right of union members to pursue actions under § 1983

Neither the *Dykes* court nor the appellate court in this case explained how the plaintiff in either case could obtain a meaningful hearing in an arbitration proceeding where the majority of the three person arbitration panel would be controlled by the defendants who were acting in concert to deprive the plaintiff of his due process rights. (see footnote 6)

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[6] Mr. Loftus had no desire to have an arbitration hearing since defendants would have controlled the outcome of any such proceeding since the three person arbitration panel would have consisted of one representative controlled by the union defendant and one representative controlled by defendant SEPTA. In other words, a majority of the panel would have been controlled by the two defendants that plaintiff asserted had acted in concert to deprive him of his right to due process.

In affirming the District Court's sanctions Order, the Court of Appeals held:

> We need not be detained by deLone's contention that because Dykes was not controlling, he could not be sanctioned for continuing to pursue the Loftus case after it was decided. As already rehearsed, Dykes is clearly controlling. The distinctions upon which deLone relies are not material. Therefore, this objection must fail. **(A14)**

Plaintiff filed a timely petition for a rehearing in which he asserted:

> In direct conflict with *Wright [v. Universal Machine, _U. S_, 119 S.Ct. 391 (1998)]*, the panel held that plaintiff was required to seek arbitration before he could pursue a lawsuit in federal court under 42 U.S.C. § 1983 asserting that defendants deprived him of property (his job) without due process of the law.

(A35) The Court of Appeals denied this petition. (A32 to A33)

## REASONS FOR ALLOWANCE OF WRIT

**1. This Court Should Grant Certiorari To Resolve the Conflict Among the United States Courts of Appeals on the Question of Whether, in the Absence of Any Clear Waiver in the Collective Bargaining Agreement of the Right to Assert Claims in Court under § 1983, a Union Member Must Try To Compel Arbitration under the Collective Bargaining Agreement as a Prerequisite to Filing Suit Under § 1983**

The Courts of Appeals of the First and Eighth Circuits, following the dictates of this Court's decision in *Wright v. Universal Machine, _ U.S. _, 119 S.Ct. 391 (1998),* have both held that, absent a clear waiver of the right to do so in a collective bargaining agreement, union members are not required to pursue arbitration under a collective bargaining agreement as a prerequisite to filing suit under a federal statute. See *Quint v. A. E Stanley Mfg. Co.*,172 F.3d 1, 9 ( 1st Cir. 1999); *Rosenberg v. Merrill Lynch, Pierce. Fenner & Smith,* 170 F.3d 1, 11 ( 1st Cir. 1999); *Keymer v. Management Recruiters Intern., Inc.*, 169 F.3d 501, 505 ( 8th Cir. 1999). As set forth above, the Third Circuit has held to the contrary. This Court should grant certiorari in order to allow it the opportunity to resolve this conflict on this important question of law.

**II. This Court Should Allow a Writ of Certiorari To Settle The Important Question of Whether, in Order to Avoid Sanctions under § 1927, an Attorney Must Abandon a Client and Withdraw the Client's Lawsuit Whenever an Adverse and Arguably Controlling Decision is Issued by an Appellate Court**

In *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22(1978), this Court warned:

> [I]t is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. ... Even when the law or the facts appear

questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

Similarly, Judge Higginbotham, in his discussion of issues similar to the ones in this case that arose in the case of *Williams v. Giant Eagle Markets, Inc.*, 883 F.2d 1184 (3d Cir. 1984), reversed a District Court order imposing sanctions on plaintiffs attorney under 28 U.S.C. § 1927 and explained:

> The second ground advanced by the district court for imposing sanctions against Johnson was that, "even with a *prima facie* case assumed, counsel knew or should have known that [the] plaintiff could not establish that her insubordination was merely a pretext for plaintiffs alleged discriminatory discharge."...
>
> Certainly, Johnson, who chose not to evaluate the evidence as the trial judge did in this case, had reasonable grounds for believing that Giant Eagle's purported justification for his client's dismissal was challengeable.
>
> Moreover, even if Johnson had known that Giant Eagle had an unchallengeable defense at the time he commenced this suit, that fact would not have been sufficient to support a finding of bad faith. In *Ford v. Temple Hospital*, 790 F.2d 342 (3d Cir. 1986), counsel filed an employment discrimination suit after the statute of limitations had expired. Although the statute of limitations was an affirmative defense, we held that counsel's knowledge of that fact at the time that he initiated the lawsuit could not be the basis for a finding of bad faith. ...
>
> We believe that the trial judge fell into error in his understanding of the prerequisite for imposing liability against Johnson under § 1927. The imposition of attorneys' fees, under the facts of this case, would deprive a lawyer of his ethical obligation to represent his client zealously. The late Judge Weinfeld wisely admonished us that
>
> > [t]he power to assess fees against an attorney should be exercised with restraint lest the prospect thereof chill the order of proper and forceful advocacy on behalf of his client.

The potential chilling effect of the district court's and appellate panel's decisions in the present case is very, very great. In essence, the panel has directed counsel for plaintiffs to withdraw their clients' cases or risk personal sanctions whenever an appellate decision is handed down that arguably requires the entry of summary judgment against plaintiff. This dangerous view is particularly alarming in this case where the court, if it viewed the arguably controlling decision in *Dykes* to be dispositive, could have easily entered summary judgment without waiting for any action by plaintiff's counsel. Further, such alarm is heightened here since the Supreme Court's decision in *Wright* demonstrates that plaintiff's counsel had good reason to believe that the *Dykes* decision was not controlling.

The Court of Appeals tried to downplay the importance of its decision on sanctions by noting:

> [T]he meaningfulness of reversing the District Court on [the sanctions] issue would be "de minimis" since "the Court in the exercise of its discretion reduced the amount of attorney fees which the defendants proved they were entitled to receive from approximately $23,000 to $4,000." Loftus v. SEPTA, No. Civ. A. 93-2471, 1998 WL 372151 at *1 (E.D. Pa. June 19, 1998).

(A16, n.1 3), The panel, however, has failed to pay due heed to the harmful, chilling effect of the District Court decision and the panel's affirming opinion. The panel has also failed to take into account the extensive publicity this case has received. Such publicity has included the front page, lead story in the April 16, 1999 edition of *The Legal Intelligencer*, the newspaper for lawyers in the Philadelphia area, which bore the headline "When First Suit Loses on *Appeal, Identical Suit Must Be Dropped 3rd Circuit OKs Attorney Sanctions,* " and the stories on this case that appeared in the May 12, 1998 and June 25, 1998 editions of that paper.

## CONCLUSION

Supreme Court Rule 10 explains the this Court may grant Certiorari when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; [or] .... has decided an important question of federal law that has not been, but should be, settled by this Court_" This case involves both a conflict in decisions by different United States Courts of Appeals and an important question of federal law that should be settled by this Court. For these reasons, petitioner respectfully requests that this Court grant this Petition for a Writ Certiorari.

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# APPENDIX

**UNREPORTED - NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 98-1114/98-1435/98-1530/98-1664

FRANCIS J. LOFTUS,

Francis J. Loftus, Appellant in No. 98-1114;
H. Francis deLone, Jr., Appellant in Nos.
98-1435, 98-1530, and 98-1664

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY;
TRANSPORT WORKERS UNION OF PHILADELPHIA, LOCAL 234,
TRANSPORT WORKERS UNION OF AMERICA/AFL-CIO

Appeal from the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil No. 93-2471)
District Judge: Honorable Eduardo C. Roberno

Submitted Pursuant to Third Circuit LAR 34.1(a)
March 1, 1999

BEFORE: ALITO and MCKEE, Circuit Judges
and SCHWARTZ, District Judge*

(Opinion filed April 13, 1999)

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*Hon. Murray M. Schwartz, Senior United States District Judge for the District of Delaware, sitting by designation.

## MEMORANDUM OPINION OF THE COURT

SCHWARTZ, Senior District Judge

Before the Court are the appeal of Francis J. Loftus ("Loftus") in No. 98-1114 from a grant of summary judgment and the appeals of Loftus' attorney, H. Francis deLone, Jr., in No. 98-1435 from an award of attorneys' fees against him pursuant to 28 U.S.C.§1927, No. 98-1530 from the postponement of a hearing on a motion to stay, and No. 98-1664 rom an order holding deLone in contempt, all from the Eastern District of Pennsylvania.[1] These appeals were consolidated for all purposes by orders dated July 30, 1998, and August 4, 1998. Also before this Court are two motions by Appellee Southeastern Pennsylvania Transportation Authority ("SEPTA")[2]: 1) to dismiss the appeal in No. 98-1350 for want of appellate jurisdiction; and 2) for punitive damages and double costs against both Appellees in No. 98-1114, pursuant to Fed. R. App. P. 38 and 28 U.S.C. § 1912.

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[1]The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. We have appellate jurisdiction over Appeals Nos. 98-1114, 98-1435 and 98-1664 pursuant to 28 U.S.C. § 1291. We consider our jurisdiction over the appeal in No. 98-1530 below.

[2]Pursuant to Federal Rule of Appellate Procedure 31(c), SEPTA also moves to dismiss the consolidated appeals for failure to timely file the Appellants' brief. The docket sheet reflects, however that the Clerk granted deLone and Loftus leave to file out of time. In an opinion by Judge Nygaard, the Court subsequently denied review of the Clerk's order to allow filing out of time. Federal Rule of Appellate Procedure 31(c) provides than an appellee may move for dismissal of appeal if appellant fails to file the brief in a timely fashion or "within the time as extended." Here, the Court has allowed the Appellants to file out of time. Therefore, because deLone and Loftus filed their brief "within the time extended," SEPTA no longer has grounds upon which to move for dismissal under Rule 31.

## I. Background

### A. Facts

Loftus was employed by SEPTA as a bus operator from 1988 until his discharge in May, 1991. During that time, he was a member of Transport Workers Union of Philadelphia, Local 234, Transport Workers Union of America/AFL-CIO ("Local 234") and worked pursuant to Local 234's collective bargaining agreement ("CBA") with SEPTA.

On May 11, 1990, after a random drug and alcohol test in which Loftus tested positive for alcohol, Loftus elected to undergo treatment and counseling as provided for under the CBA and the Integrated Program of Education, Assistance, and Testing for Intoxicants and Controlled Substances, As Revised, and as Further Modified and Submitted to the Honorable Edmund V. Ludwig, United States District Judge, on January 28, 1988 ("Integrated Program").[3] Upon his return to SEPTA, Loftus was subject to follow-up drug and alcohol testing. He was subject to termination if he failed any such test.

[3]Loftus' other options were resignation or discharge.

On May 10, 1991, Loftus tested positive for alcohol after an unannounced test at SEPTA's medical department.[4] Loftus was advised by a SEPTA physician that he had tested positive for alcohol and was held off from work pending a grievance hearing.

Loftus proceeded through the grievance process set out by the CBA. The first level grievance hearing, over which a SEPTA superintendent presided, was attended by Loftus and two Local 234 officers. At that hearing, the SEPTA official explained the charges and evidence against Loftus and gave Loftus and the Local 234 representatives an opportunity to respond. After the conclusion of the hearing, Loftus was discharged for violation of the Integrated Program and the CBA.

Local 234 then filed a written grievance on Loftus' behalf, triggering a second-level hearing. At that hearing were a SEPTA manager, who presided, the SEPTA superintendent from the first hearing, two Local 234 section officers, the Local 234 business agent and Loftus. After a review of documents and arguments on behalf of Loftus by the Union, the SEPTA manager denied the grievance and upheld Loftus' discharge.

Local 234 appealed Loftus' grievance, gaining a third hearing. That meeting was conducted by SEPTA's labor relations supervisor and attended by other SEPTA managers.

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[4]Although Loftus asked for a confirmatory blood test, which Loftus asserts he was entitled to under the Integrated Program, he did not receive the opportunity to provide one.

Loftus appeared with two Local 234 officers and full-time staff representatives from Local 234. Once again, after discussion of the charges and evidence, including arguments in support of Loftus, the SEPTA supervisor, in a written opinion, denied Loftus' grievance.

Under the CBA, the appropriate avenue after a third-level grievance hearing was arbitration. After review of the matter by Local 234 staff, Local 234 decided not to pursue arbitration. Local 234 notified Loftus of its decision, which Loftus did not appeal.

**B. Procedural History**

Two years after the conclusion of the three-level grievance process, Loftus filed suit in United States District Court of the Eastern District of Pennsylvania. In his amended complaint, he alleged SEPTA and Local 234 had conspired to deprive him of due process of law in violation of 42 U.S.C. § 1983. More specifically, he alleged that SEPTA and Local 234 conspired together to make the grievance process a "sham" so that the conclusion of the grievance process was a foregone conclusion.[5]

SEPTA and Local 234 moved for summary judgment in February 1996. Shortly thereafter, the District Court placed the matter in suspense pending issue of this Court's decision in Barnes v. SEPTA, 106, F3d 384 (3d Cir. 1998) (table opinion), a very factually similar case in which the plaintiff was represented by Loftus' counsel, deLone.

[5]The District Court dismissed the original complaint upon motion by SEPTA and Local 234 without prejudice; Loftus subsequently filed an Amended Complaint.

After disposition of Barnes, the District Court reopened this case. On January 13, 1998, the District Court granted SEPTA and Local 234's motion for summary judgment, holding that our decision in Dykes v. SEPTA, 68 F3d 1564 (3d Cir. 1995), was dispositive.[6]

SEPTA and Local 234 moved for attorneys' fees pursuant to 42 U.S.C. § 1988. the District Court denied the fees because it could not "find that the plaintiff knew or should have known that this court had no legal basis," and that an award of attorneys' fees would therefore be inappropriate. First Order dated February 17, 1998, A. at 972.[7] The Court further ordered that deLone be required to show cause why he should not be sanctioned for pursuing this case after the Supreme Court denied certiorari in Dykes. After hearing and briefing, the District Court sanctioned deLone pursuant to 18 U.S.C. § 1927, ordering him to pay $2,000[8] each to SEPTA and Local 234 for legal fees incurred after the suit became frivolous.[9] Loftus v. SEPTA, 8 F. Supp. 2d 458 (E.D. Pa. 1998). The Court ordered the sanctions be paid to SEPTA and Local 234 within ten days of the order.

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[6]DeLone had represented the plaintiff in Dykes.

[7]References to the Appendix appear as "A. at _____."

[8]The District Court, in its discretion did not order deLone to pay the entire amount of legal fees incurred after the case became frivolous. Loftus, 8 F. Supp. 2d at 463.

[9]The District Court calculated the attorneys' fees as if the case became frivolous on November 7, 1995, the day we issued our opinion in Dykes, not April 15, 1996, the date on which the Supreme Court denied dertiorari in Dykes.

DeLone appealed the District Court's imposition of sanctions against him and moved for a stay pending appeal in both the District Court and this Court. On May 21, 1998, the District Court issued an order scheduling a hearing on the motion to stay proceedings for June 5, 1998.[10] By consent, the parties postponed the hearing until June 9, 1998. On June 3, 1998, SEPTA and Local 234 moved the District Court to issue a rule to show cause why deLone should not be held in contempt. The District Court issued the rule to show cause, scheduling the hearing for June 9. Because at the June 9 hearing deLone stated that he had not received notice of the show cause hearing, the District Court rescheduled the show cause hearing for June 19 and stated it would issue a decision regarding the stay at the same time for purposes of judicial economy. DeLone appealed that order.

Finally, the District Court issued two orders dated June 19. The first held deLone in contempt and ordered DeLone to pay: (1) $100 per day to the Court until he paid the sanction; and (2) attorney's fees in connection with the contempt motions. 8 F. Suppl 2d at 466. The second order denied deLone's motion for a stay pending an appeal and instead granted a stay conditioned on deLone posting bond in the amount of $8,000 to ensure payment of the sanctions should the order be affirmed. 1998 WL 372151, at *1. DeLone has appealed only the order finding him in contempt. Subsequently, on June 22, 1998, this Court granted deLone a stay pending appeal.

[10]A footnote to that order noted "Until a stay is granted by the Court, Mr. deLone is bound by the terms of the Court's Order [imposing sanctions], and therefore the Court presumes that the sanction imposed by the Court upon Mr. deLone has been satisfied." Order dated May 21, 1998, A. at 994 (citation omitted).

## II. No. 98-1114: Appeal of Loftus from Grant of Summary Judgment

Loftus urges this Court to reverse the District Court's grant of summary judgment in favor of SEPTA and Local 234. We review the District Court's grant of summary judgment de novo and view the disputed evidence in the light most favorable to the nonmoving party. Newport Associates Development Co. v. Travelers Indemnity Co. of Illinois, 162 F.3d 789, 791 (3d Cir. 1998).

Despite Loftus' arguments to the contrary, Dykes clearly controls and mandates summary judgment for the defendants. In Dykes we held that where

> a plaintiff alleges that the defendants acted in concert to deprive him both of a meaningful hearing and of arbitration, we believe that the administrative process in place has incorporated safeguards adequate to resolve these allegations in a manner consistent with the demands of due process. Significantly, Dykes could have asked a court of common pleas to order arbitration pursuant to the collective bargaining agreement, thereby assuring him of the due process to which he was entitled. Because he chose not to do so, Dykes is unable to prove a violation of 42 U.S.C. § 1983 by SEPTA or by Local 234.

68 F. 3d at 1572. The material facts and legal theory upon which Loftus rested his case are, in all material respects, identical to those facts relevant to our decision in Dykes. In each case, the plaintiff was employed by SEPTA pursuant to the same collective bargaining agreement with Local 234. In each case, the plaintiff was disciplined pursuant to the drug and alcohol policy of that collective bargaining agreement. In each case, Local 234 went through the first three stages of the grievance process with the plaintiff. And in each case, the Union declined to pursue the final step – arbitration – on behalf of the plaintiff. Finally, in each case, the plaintiff never sought enforcement of his due process rights under the collective bargaining agreement by bringing an action to compel arbitration in a court of common pleas in Pennsylvania. Because the plaintiff in Dykes, like the plaintiff here, did not seek all the process he was due, he could not complain he was deprived of that process. Id. In this case, as in Dykes, therefore, the plaintiff could not show he was deprived of his due

process rights since he did not ask for all those rights. We therefore affirm the District Court's grant of summary judgment.

Loftus makes several attempts to distinguish the instant case from Dykes – all to no avail. First, he suggests that because SEPTA and Local 234 were allegedly in a conspiracy to deprive him of his rights, the arbitration, in which a representative of each would participate along with a third, neutral arbitrator, would be meaningless. Thus, he suggests the District Court's requirement that he seek all the process due him by seeking to compel arbitration in state court was meaningless. However, we also addressed that concern in Dykes. There, we reaffirmed that "[w]here a due process claim is raised against a public employer, and grievance and arbitration procedures are in place ... those procedures satisfy due process requirements 'even if the hearing conducted by the Employer ... [was] inherently biased.'" Dykes, 68 F.3d at 1571 (quoting Jackson v. Temple University, 721 F.2d 931 (3d Cir. 1983)). Thus, whether the arbitration would be "meaningless" in this case is irrelevant.

Loftus argues the real issue is "what process is due an individual to determine if he was denied a right to which he was entitled under express provisions of a drug and alcohol testing program?" Appellant's Br. at 18. He distinguishes this from Dykes where the issue the plaintiff had raised in the grievance process was whether SEPTA had "reasonable suspicion" to perform drug testing.[11] However, the underlying issue for arbitration – whether SEPTA adhered to the requirements of the collective bargaining agreement – is not the issue Loftus raised in his complaint. Rather, he alleged SEPTA deprived him of a meaningful opportunity to be heard, A. at 743-44, and "Local 234 ... aided and abetted and acted in concert with SEPTA in effecting the deprivation of plaintiff's due process rights described herein." A. at 745. Loftus really complains about the process by which SEPTA and Local 234 reviewed his discharge. As already rehearsed, Loftus did not seek all the process due him. Therefore, we cannot say he was deprived of due process.

Finally, Loftus argues that the District Court's decision is not in keeping with Supreme Court precedent. Loftus suggests the District Court's interpretation of Dykes, an identical matter in all relevant respects to the instant one, is erroneous, not that Dykes itself is not in keeping with Supreme Court teaching. Dykes is the law of the Third Circuit.

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[11]In Dykes, the plaintiff raised two separate arguments. First, he argued SEPTA had violated his Fourth Amendment rights when it performed a drug test on him. This is an argument he had raised in the grievance process. Second, he argued SEPTA and Local 234's conduct of the grievance process had violated his due process rights. Thus, Dykes has two distinct holdings. We did hold that in a complaint alleging violations of an employee's Fourth Amendment rights, the issue of whether the employer had the "reasonable suspicion" required by the collective bargaining agreement to perform tests of the employee was a question of fact for determination in the grievance process. 68 F.3d at 1570. However, that holding was in response to the plaintiff's claim that SEPTA had violated his Fourth Amendment rights. The second holding directly controlling to this case is that where an employee alleges a violation of his due process rights, the employee must first seek all the process due him.

Where that case was directly controlling, as we have already held it is here, the District Court was bound to apply it unless the case has been overruled by the Supreme Court. As a fundamental matter, then, we do not see how Loftus can, in good faith, argue that the District Court erred in its application of Dykes. However, we will consider, briefly, his arguments, all of which are without merit.

First, Loftus argues that "the District Court's holding that plaintiff was required to seek a state court order compelling arbitration before seeking relief under § 1983 is in direct conflict with Supreme Court decisions holding that a plaintiff is not required to exhaust all possible state remedies before bringing a § 1983 action." Appellant's Br. at 15. Loftus misinterprets Dykes, and the District Court's interpretation of that case. The District Court said only that he was required to "assure[] himself of the procedural due process to which he was entitled," not that he was required to exhaust remedies under state law. Order dated January 13, 1998, at 2-3 n.1. Moreover, those cases which Loftus cites in favor of his argument are inapposite, and irrelevant to this case.[12]

[12]*Ellis v. Dyson*, 421 U.S. 426(1975), held only that where plaintiffs had been convicted of violating a local ordinance, they were not required to pursue the state appeals process but could, rather, bring an action for declaratory judgment seeking to have the same ordinance declared unconstitutional if they faced a continuing threat of prosecution under that ordinance; *Alle v. Medrano*, 416 U.S. 802 (1974), held that when state law enforcement officials conspired to deprive plaintiffs of their rights by unlawful arrest and confinement and by restraining their exercise of first amendment rights, the plaintiffs need not resort to state remedies; and *Monroe v. Pape*, 365 U.S. 167, 183 (1961), held that plaintiffs in police abuse case need not seek parallel relief under state law before seeking § 1983 relief. Unlike the present case, the plaintiffs in these cases did not fail to pursue all the process they were due, but rather, after being denied the process they sought, turned to § 1983.

Similarly, Loftus' argument that "the Supreme Court has held that individuals have the right to have the courts, rather than grievance/arbitration panels, resolve issues raised in actions asserting claims under 42 U.S.C. § 1983 and various other federal statutes" is not germane. Loftus bases his § 1983 claim on the argument that he did not receive all the process which he was due in those hearings. This is not the issue an arbitration panel would have had before it. Neither the District Court's decision granting summary judgment in this case nor our decision in Dykes suggests Loftus must arbitrate whether the grievance process was fair. Rather, Loftus must first seek arbitration before he can claim he was denied due process.

The District Court was correct when it held that Dykes was fully controlling in this case. Any attempt by Loftus to distinguish his case from Dykes is wholly without merit. We therefore affirm the District Court's grant of summary judgment.

**III. Nos. 98-1435: Appeal of deLone from Award of Sanctions**

DeLone appeals the District Court's imposition of sanctions upon him on several grounds. DeLone's primary objection is based upon the fact that the sanctions were issued more than three months after final judgment in the underlying case. He also argues the District Court erred when it held that Dykes was controlling and consequently erred in finding the suit became untenable after this Court decided Dykes. DeLone further argues he was denied due process since the District Court stated only that it was considering granting sanctions against deLone for continuing the case after certiorari was denied in Dykes, but, after briefing by SEPTA and Local 234, awarded sanctions based on deLone's continuing the Loftus matter after this Court's decision is Dykes.

Finally, deLone argues his actions did not satisfy the requirements of 28 U.S.C. § 1927. We disagree with each of deLone's contentions and affirm the District Court's award of sanctions.

Title 28, section 27 of the United States Code provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiples the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

We review of the District Court's award of attorneys' fees pursuant to that statute for abuse of discretion. Zuk v. Eastern Pennsylvania Psychiatric Institute of the Medical College of Pennsylvania, 103 F.3d 294, 297 (3d Cir. 1996).

We turn first to deLone's contention that the sanctions were initiated out of time. In Pensiero v. Lingle, 847 F.2d 90, 99 (3d Cir. 1998), this Court adopted "as a supervisory rule for the courts in the Third Circuit a requirement that all motions requesting Rule 11 sanctions be filed in the district court before the entry of a final judgment." In Simmerman v. Corino, 27 F.3d 58, 62-63 (3d Cir. 1994), we extended the reasoning of Pensiero to sua sponte imposition of Rule 11 sanctions, holding the District Court abused its discretion when it imposed sanctions sua sponte more than three months after final disposition of a case on motion for summary judgment. DeLone urges us to apply Simmerman here because the District Court imposed sanctions more than three months after it entered summary judgment. However, Simmerman is not applicable here, where sanctions pursuant to 28 U.S.C. § 1927, not Rule 11, are at issue.

This Court has never applied the Pensiero-Simmerman limitations to sanctions ordered pursuant to 28 U.S.C. § 1927 and declines to do so now. Indeed, the reasoning of Pensiero suggests this Court's supervisory rule was intended to apply only to Rule 11 sanctions. In Pensiero, the Court focused on the fact that Rule 11 sanctions relate to a particular violation rather than the conduct of the entire matter, as is the case for statutory attorneys' fees. 847 F.2d at 99; see. Fed. R. Civ. P. 11 (sanctions available when "a pleading, written motion, or other paper" violates standards set by Rule). In the case of 28 U.S.C. § 1927, however, the conduct for which a defendant is being sanctioned may relate not simply to one filing, but to behavior or general conduct during the course of an entire litigation. Further, this statutory provision is more like an attorneys' fees provision

than Rule 11 in the sense that 28 U.S.C. § 1927 is directed at compensation for costs and fees actually incurred rather than the broad sanctions available at the discretion of the Court under Rule 11. Thus, an extension of the supervisory rule of Pensiero or the time limitation of Simmerman to 28 U.S.C. § 1927 would not be appropriate here where the Court must consider the impact of a potentially long-term course of conduct and be able to calculate the full measure of fees incurred because of the conduct sanctioned. We therefore hold that when the District Court raised the issue of possible sanctions under 28 U.S.C. § 1927 approximately one month after entry of final judgment as in this case, it did not abuse its discretion. See Williams v. Giant Eagle Markets, Inc., 883 F.2d 1184, 1191 (3d Cir. 1989) (stating 28 U.S.C. § 1927 grants the court authority to impose sanctions for serious and studied disregard for the orderly process of justice).

We need not be detained by deLone's contention that because Dykes was not controlling, he could not be sanctioned for continuing to pursue the Loftus case after it was decided. As already rehearsed, Dykes is clearly controlling. The distinctions upon which deLone relies are not material. Therefore, this objection must fail.

DeLone next objects he was denied due process since the District Court stated only that it was considering granting sanctions against deLone for continuing the case after the Supreme Court denied certiorari in Dykes, but, after briefing by SEPTA and Local 234, awarded sanctions based on deLone's continuation of the Loftus case after this Court's decision in Dykes. This argument, however, is without merit. DeLone is correct when he states recites that "[t]he party sought to be sanctioned is entitled to particularized notice including ... the reasons why sanctions are under consideration." Simmerman, 27 F.3d at 64; accord In re Tutu Wells Contamination Litigation, 120 F.3d 368, 379 (3d Cir. 1997). This Court has explained that factual context is important in determining whether a party has adequate notice about the sanctions under consideration. We have expressed concern that "a party cannot adequately defend himself against the imposition of sanctions unless he or she is aware of the issues that must be addressed to avoid he sanctions." Tutu Wells, 120 F.3d at 379. However, the key issue is whether "the party in fact had the opportunity to mount a meaningful defense." Id. at 380.

The facts indicate deLone had an adequate opportunity to defend himself and to argue the case could only have become frivolous after the Supreme Court denied certiorari in Dykes in April 1996, not after the Third Circuit opinion in Dykes in November 1995. Although the District Court's original order to show cause referred only to the April 1996 date,

SEPTA argued the case became frivolous as of November 1995. The District Court ordered post-hearing briefing on the sanctions issue. In his brief, deLone explicitly responded to SEPTA's argument. Thus, deLone clearly had particularized notice of the issues before the District Court. As a factual matter, then, the District Court did not violate deLone's due process rights by holding the Loftus matter became frivolous after November 1995 rather than April 1996.[13]

Finally, deLone suggests that, assuming the suit became frivolous in November 1995, he could not have "multiplied the proceedings" as required by 28 U.S.C. § 1927 when he filed only five documents with the Court after that date. However, the District Court did not abuse its discretion when it found deLone had "multiplied the proceedings." Indeed, whether deLone filed no documents or one hundred, by failing to stop pursuit of a case that had become frivolous, deLone forced the District Court and SEPTA and Local 234 to continue with unnecessary proceedings. For example, the District Court had to go to the trouble of removing the matter from administrative suspense, review and reacquaint itself with the matter, consider the motion and issue an order. All of this work was unnecessary. Accordingly, we hold the District Court did not abuse its discretion when it found that deLone had multiplied the proceedings unreasonably and vexatiously and therefore should be sanctioned pursuant to 28 U.S.C. § 1927.

To summarize, none of the arguments which deLone makes in challenge to the District Court's imposition of sanctions pursuant to 28 U.S.C. § 1927 have merit. We therefore affirm the District Court's award of sanctions in the amount of $40,000, to be divided evenly between the Defendants to partially reimburse them for their attorneys' fees.

## IV. Nos. 98-1530 and 98-1664: Appeal of deLone from Scheduling and Contempt Orders

### A. Appellate Jurisdiction

SEPTA has moved to dismiss the appeal in No. 98-1530 for want of appellate jurisdiction. SEPTA contends because that order is not a final order, we have no jurisdiction over the issue. We find, however, that we do have jurisdiction to hear deLone's appeal from the order postponing the District Court's consideration of deLone's motion for a stay pending appeal. Under 28 U.S.C. § 1292, we have jurisdiction only over final orders and those interlocutory orders which meet certain requirements not suggested here. DeLone apparently asserts that because the Court had

entered final judgment against Loftus, an order by the District Court could be appealed. "[A] decision is ordinarily considered final and appealable under § 1291 only if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712 (1996) (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)). We need not consider whether the final judgment against Loftus makes all subsequent orders issued regarding deLone appealable; even if we do not have jurisdiction under 28 U.S.C. § 1292, we have pendent appellate jurisdiction because "the issue over which we have jurisdiction cannot be resolved without reference to the otherwise nonappealable issue." In re Tutu Wells Contamination Litigation, 120 F.3d 368, 382 (3d Cir. 1998). The issue of whether the District Court erred when it postponed considering deLone's motion for a stay until after it ruled on its contempt order is one basis upon which deLone challenges the contempt ruling. Therefore, we must consider the issue in considering the appeal from the contempt order, which is clearly final. We therefore exercise pendent appellate jurisdiction in the appeal in No. 98-1530.

**B. The Merits**

DeLone challenges the Court's decision to put off consideration of the stay until after the contempt hearing because "[i]f the lower court had decided the stay motion correctly and in a timely fashion, ... the possibility of a contempt order never would have been an issue." Thus, it appears deLone asserts two arguments: first, the District Court erred when it put off deciding the stay action at all; secondly, the contempt error is somehow invalid because if the Court had issued an unconditional stay on June 9, rather than waiting until the contempt hearing on June 19, deLone would not have been in contempt. These contentions, which have not even been cursorily briefed, are meritless. As to the scheduling order itself, the District Court has almost complete discretion over its docket. Continental Casualty Co. v. Dominick D'Andrea, Inc., 150 F.3d 245, 253 (3d Cir. 1998) (citing In re Fine Paper Antitrust Litigation, 685 F.2d 810, 817 (3d Cir. 1982)). It is well within the District Court's discretion to consider the contempt order before considering the stay motion and we will not second-guess the District Court's decision. Moreover, the District Court's

decision to consider the contempt order before passing upon the stay does not somehow undermine the legitimacy of the contempt order. The District Court denied deLone an unconditional stay, and that order has not been appealed.[14] This Court declines to engage in the "what if" game in which deLone invites us to participate. To repeat, the District Court was well within its discretion to address the contempt issue first, and such decision has no impact on whether deLone was in contempt.

DeLone rather hazily puts forth two further arguments challenging the contempt order. First, he argues that because the District Court's order imposing sanctions was invalid, the contempt order is also invalid. Second, because the docket entries indicate the contempt order was docketed on the same day this Court granted stay of the proceedings in the District Court, deLone argues the contempt order has been "invalid from the day it was entered."[15] Both positions are incorrect.

First, the order underlying the District Court's finding of contempt was not invalid. Whether the underlying order pursuant to 28 U.S.C. § 1927 was correct is irrelevant to our inquiry. As we have stated in the criminal contempt context, "[a] person who makes a private determination that an order is incorrect ... may properly be convicted of criminal contempt for violation of the order even if his or her private determination is later proven correct in the courts." United States v. Stine, 646 F.2d 839, 845 (3d Cir. 1981) (citing Walker v. City of Birmingham, 388 U.S. 307 (1967)). As the District Court noted, whether or not a Court has committed legal error, which, of course, we hold the District Court did not, the Court may act to enforce its orders.

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[14]Although deLone appears to challenge the refusal to grant an unconditional stay, because he filed no appeal from that order, we will not consider the merits of that contention. See Fed. R. App. P. 3(a).

[15]It is unclear whether deLone means the entering of the contempt order on the day the this Court stayed proceedings violated that stay and was therefore never valid, or whether the stay order somehow had the effect of invalidating the finding of contempt. We address the first reading of deLone's argument above. The second possible reading is without merit. A stay does not vitiate a finding of contempt.

The notion that the contempt order has been "void from the day it was entered" is equally without merit. Although the order was docketed on June 22, 1998, the same day this Court granted a stay pending appeal, the order is clearly dated June 19, 1998. Indeed, the docket entries for this appeal indicate the order was before the Court when it issued the stay dated June 22, 1998.[16] Thus, the contempt order preceded the stay and was not issued after the stay. To the extent deLone means that once the stay was issued the contempt order somehow became "void," such an argument is nonsense. A stay pending appeal does not "void," vacate or otherwise intrude upon the validity of orders previously issued. See Fed. R. Civ. P. 62 (stays permitted therein limit only the *execution of the judgment*). Therefore, these arguments also ultimately fail.

DeLone does not argue he was not in contempt. Because he cannot demonstrate any procedural flaws with the contempt order, we affirm the District Court's order holding him in contempt for failure to pay the sanctions issued pursuant to 28 U.S.C. § 1927.

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[15]It is unclear whether deLone means the entering of the contempt order on the day the this Court stayed proceedings violated that stay and was therefore never valid, or whether the stay order somehow had the effect of invalidating the finding of contempt. We address the first reading of deLone's argument above. The second possible reading is without merit. A stay does not vitiate a finding of contempt.

[16]Furthermore, since Federal Rule of Civil Procedure 8 requires prior action or failure to act by the District Court and details of "the reasons given by the district court for its action" before a Court of Appeals may issue a stay, Fed. R. App. P. 8(a), it is likely the district court ruling, which was accompanied by the District Court's reasoning, was issued before this Court issued its stay.

## V. Motion for Appellate Sanctions

Appellee SEPTA moves for punitive damages and double costs against Loftus and deLone pursuant to Federal Rule of Appellate Procedure 38[17] and 28 U.S.C. § 1912[18] on the ground that the appeal from the District Court's summary judgment order is frivolous. Under the plain language of Rule 38 and § 1912, sanctions are nonmandatory. We decline, in our discretion, to grant the requested sanctions.

## VI. Conclusion

We affirm the District Court in all respects. We have held the District Court properly granted summary judgment to SEPTA and Local 234. We further affirm the District Court's award of sanctions to SEPTA and Local 234 against deLone. We find that this Court has appellate jurisdiction to hear deLone's appeal from the order postponing the District Court's consideration of deLone's motion for a stay pending appeal. Finally, we agree with the District Court that deLone was in contempt when he failed to pay the sanctions ordered by the district court.

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TO THE CLERK:

Please file the foregoing Memorandum Opinion.

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Senior District Judge

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[17]Federal Rule of Appellate Procedure 38 states: "If a court of appeals determines that an appeal is frivolous, it may, after separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee."

[18]Title 28, section 1912 of the United States Code provides: "Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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|---|---|---|
| FRANCIS J. LOFTUS, | : | CIVIL ACTION |
| | : | NO. 93-2471 |
| Plaintiff, | : | |
| | : | |
| v. | : | |
| | : | |
| SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY | : | |
| | : | |
| and | : | |
| | : | |
| TRANSPORT WORKERS UNION OF PHILADELPHIA, LOCAL 234, | : | |
| | : | |
| Defendants. | : | |

ORDER

**AND NOW,** this **13th** day of **January, 1998,** upon consideration of motion by defendant Southeastern Pennsylvania Transportation Authority ("SEPTA") for summary judgment (doc. no. 41), motion by defendant Transport Workers Union Local 234 ("Local 234") for summary judgment (doc. no. 43), plaintiff's answer to defendants' motions (doc. no. 46), reply by defendant Local 234 (doc. no. 47), surreply by plaintiff (doc. no. 49), supplemental memorandum by plaintiff in opposition to defendants' motions for summary judgment (doc. no. 59), and responses thereto (doc. nos. 60 & 61), it is hereby **ORDERED** that motions for summary judgment by defendants SEPTA and Local 234 (doc. nos. 41 & 43) are **GRANTED**.[1]

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[1]Plaintiff alleges that defendants SEPTA and Local 234 violated 42 U.S.C. § 1983 when they conspired to deprive him of his Fourteenth Amendment right to procedural due process during the course of the grievance proceedings which followed his discharge from employment. Defendants request that this Court grant summary judgment in its favor on that claim because: (1) there is no evidence that SEPTA and Local 234 corrupted or made a sham of the grievance process associated with plaintiff's discharge; and (2) the Third Circuit's decision in Dykes v. Southeastern Pennsylvania Transportation Authority, 68 F.3d 1564 (3d Cir. 1995), bars the plaintiff's claim. The Court agrees the under the law, as outlined by Dykes, defendants are entitled to judgment as a matter of law. Therefore, summa-

[1](...continued)

ry judgment is granted in favor of the defendants. Having reached this conclusion, the Court need not address the first basis for summary judgment presented by the defendants.

Summary judgment is appropriate if the moving party can "show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When ruling on a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The Court must accept the non-movant's version of the facts as true, and resolve conflicts in the non-movant's favor. Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993).

The moving party bears the initial burden of demonstrating the absence of genuine issues of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Once the movant has done so, however, the non-moving party cannot rest on its pleadings. See Fed. R. Civ. P. 56(e). Rather, the non-movant must then "make a showing sufficient to establish the existence of every element essential to his case, based on the affidavits or by depositions and admissions on file." Harter v. GAF Corp., 967 F.2d 846, 852 (3d Cir. 1992); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

In Dykes, the plaintiff was discharged from his job as a bus driver at SEPTA, pursuant to Section 1203 of the collective bargaining agreement, on the grounds that he refused to submit to a "reasonable suspicion" drug and alcohol test. Dykes, 68 F.3d at 1566-67, n. 4. Local 234 pursued the plaintiff's grievance through three levels of the grievance procedure, but SEPTA refused to overturn the discharge. Id. at 1566. Ultimately, Local 234 elected not to file the plaintiff's case for arbitration. Id. After Local 234 elected not to pursue arbitration, Dykes filed a complaint in federal court alleging, among other things, that SEPTA and Local 234 violated 42 U.S.C. § 1983 when they conspired to deprive him of his Fourteenth Amendment right to due process of law with respect to the grievance proceedings which followed his firing. Id.

In dismissing Mr. Dykes's claim pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure, the Third Circuit noted that Dykes had available to him a procedure by which he could seek relief from a defective grievance process because:

> Once an employee establishes that a Union has acted in bad faith toward its member[,] ... the Court of Common Pleas sitting in equity may order completion of the arbitration procedure... .

Id., at 1571 (quoting Martino v. TWU, Local 234, 505 Pa. 391, 409-410 (1984)). The court then held that Dykes could have assured himself of the procedural due process to which he was entitled by asking the court of common pleas to order arbitration. Id. at 1572. Because he had not done so, the court found him unable to prove that he had been deprived of due process in violation of 42 U.S.C. § 1983, and dismissed his claim. Id.

The case before this Court is almost identical to Dykes. In both cases, the plaintiff

It is further **ORDERED** that **JUDGMENT IS ENTERED** in favor of the defendants and against the plaintiff.

**AND IT IS SO ORDERED.**

EDUARDO C. ROBENO, J.

[1](...continued)

alleged that SEPTA and Local 234 violated 42 U.S.C. § 1983 by conspiring to deprive him of his right to procedural due process during the course of the grievance proceedings incident to his discharge. Each plaintiff proceeded through the grievance process, and received notice from Local 234 that the union would not be pursuing arbitration. (P1. Amen. Comp., doc. no. 14, ¶ 11). Loftus, like Dykes, also appears to never have asked the court of common pleas to order arbitration. Plaintiff has not presented any affidavits, depositions or admissions on file indicating that he made such a request.

Because there is no genuine issue of material fact as to whether plaintiff requested a court of common pleas to order arbitration, and because under the teachings of Dykes, defendants are entitled to judgment as a matter of law, summary judgment must be entered in favor of the defendants.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| FRANCIS J. LOFTUS, | : | CIVIL ACTION |
| | : | NO. 93-2471 |
| **Plaintiff,** | : | |
| | : | |
| v. | : | |
| | : | |
| SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, ET AL. | : | |
| | : | |
| Defendants. | : | |

MEMORANDUM

EDUARDO C. ROBRENO, J. MAY 7, 1998

Before the Court is an Order to Show Cause why counsel should not be sanctioned under the authority of 28 U.S.C. § 1927 for continuing to pursue the instant lawsuit once it became clear during the course of litigation that the lawsuit once it became clear during the course of litigation that the lawsuit was frivolous.

As Judge Schwarzer has noted: "[o]f all the duties of the judge, imposing sanctions on lawyers is perhaps the most unpleasant."[1] Yet, none is more important. Because the willful prosecution of frivolous claims not only inflicts costs on innocent parties, but also consumes judicial resources to the detriment of meritorious claims, the imposition of sanctions upon willful transgressors is essential to preserving public confidence in our system of justice. With this important role of sanctions in mind, and for the reasons stated below, the Court Mr. deLone, on behalf of Mr. Loftus, opposed the defendants' motions for summary judgment. On January 13, 1998,[3] the Court granted defendants' motions for summary judgment finding that the Dykes case was indistinguishable from Mr. Loftus's claim and indeed controlled the outcome of this case. (Ct. Order 1/13/98 at n.1, doc. no. 63).

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[1]This matter was stayed between April 19, 1996 and June 20, 1997 for reasons unrelated to this discussion.

After summary judgment was granted in their favor, SEPTA and Local 234, as prevailing parties, filed motions for the award of attorney fees pursuant to 42 U.S.C. § 1988(b). Because § 1988 only authorizes the award of attorney fees against losing parties and not counsel representing the losing party, and because defendants could not show that plaintiff himself (as opposed to his lawyer) either knew or should have known that the cause of action alleged in the complaint had become frivolous after the Dykes decision, the Court denied the motions.

The conduct of plaintiff's counsel, which was placed on the record during the hearing on the defendants' motions for attorney fees, however, raised in the Court's mind serious issues about the actions of plaintiff's counsel in this litigation. Therefore, the Court issued a rule to show cause why sanctions under § 1927[4] should not be imposed upon plaintiff's counsel for continuing the litigation of this case after the claim had become frivolous.

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[4]Sanctions under Rule 11 are not available in this case because final judgment has already been entered in this case by the Court. See Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90 (3d Cir 1988) (adopting supervisory rule which requires "counsel seeking Rule 11 sanctions [to] file their motions before entry of final judgment in district court"); Simmerman v. Corino, 27 F.3d 58, 62 (3d Cir. 1994) (applying supervisory rule adopted in Pensiero to sua sponte Rule 11 motions of the court). The Pensiero rule does not apply to sanctions imposed pursuant to § 1927. See Matthews v. Freedman, 128 F.R.D. 194, 205-07 (E.D.Pa. 1989) (allowing sanctions under § 1927 when Rule 11 sanctions were barred by Pensiero rule); ADW, Inc. v. Lutheran Social Mission Society, 1989 WL 83407 (E.D.Pa. July 19, 1989) ("[Defendant] is correct that Pensiero does not extend to 28 U.S.C. 1927.").

With respect to the Court's inherent power to sanction, the Supreme Court has instructed that "[where there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the rules are up to the task, the court may safely rely on its inherent power." Chambers v. NASCO, 111 S.Ct. 2123 (1991). Having found that § 1927 is "up to the task," the Court will rely on § 1927 rather than its inherent powers.

The parties were afforded an opportunity to make written submissions, and to offer evidence and legal arguments at a hearing.[5]

[5]A lawyer is entitled to certain due process protections before a court may sanction the lawyer for his or her conduct in litigation before the court. Simmerman v. Carino, 27 F.3d 58, 64 (3d Cir. 1994) (citing Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980)). These protections include notice and an opportunity to be heard, and apply whether the sanctions are initiated by an adversary or by the Court sua sponte. Id. The due process requirements are satisfied by issuing upon the lawyer who is the target of the sanctions an order to show cause why sanctions should not be imposed and by providing the named lawyer an opportunity to respond. Id.

Here, the applicable due process requirements have been satisfied. On February 17, 1998, the Court issued upon Mr. deLone a rule to show cause order. At a hearing on February 27, 1998, Mr. deLone was permitted an opportunity to present evidence and to argue against the imposition of sanctions. Mr. deLone was also afforded an opportunity to file legal memoranda which he did on two separate occasions

## II. Analysis

### A. Attorney Fees Under 28 U.S.C. § 1927

Section 1927 of Title 28 of the United States Code provides:

> any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. Under § 1927, sanctions are directed at the offending attorney and may not be imposed upon the client. Boykin v. Bloomsburg University of Pennsylvania, 905 F. Supp. 1335 (M.D.Pa. 1995) (citing Williams v. Giant Eagle Markets, Inc., 883 F.2d 1184, 1190 (3d Cir. 1989)).

"In determining whether imposition of the sanctions contemplated by § 1927 is called for, the question to be addressed is whether the attorney sought to be sanctioned is fairly chargeable with actions taken which are tantamount to willful bad faith." Costello v. Daddario, 710 F. Supp. 1035, 1037 (3d Cir. 1989) (citing Baker Indus. v. Cerberus Ltd., 764 F.3d 204, 209 (3d Cir. 1985)). The Court of Appeals for the Third Circuit has stated that the "intentional advancement of a baseless contention that is made for an ulterior purpose, e.g., harassment or delay" may be indicative of bad faith. Ford v. Temple Hospital, 790 F.2d 342, 347 (3d Cir. 1986). When a claim is advocated despite the fact that it is patently frivolous or where a litigant continues to pursue a claim in the face of an irrebuttable defense, bad faith can be implied. See Hicks v. Arthur, 891 F. Supp. 213 (E.D.Pa. 1995) (imposing § 1927 sanctions because claims plainly barred by federal and state law); Boykin, 905 F. Supp. at 1335 (finding bad faith when attorney pursued claim after being informed that it was time barred). Additionally, "even if a lawsuit was initially filed in good faith, sanctions may be imposed on an attorney for all costs and fees incurred after the continuation of the lawsuit which is deemed to be in bad faith." Id. at 1446-47 (citing Fred A. Smith Lumber Co. v. Edidin, 845 F2d 750 (7th Cir. 1988); Matthews v. Freedman, 128 F.R.D. 194, 207 (E.D.Pa. 1989)). "Courts, however, should be cautious in awarding counsel fees for fear of chilling the [litigants] exercise of constitutional rights." Hicks, 891 F. Supp. at 214 (citing Kutska v. California State College, 564 F.2d 108, 110 (3d Cir. 1977)) (other citations omitted).

A number of factors serve to convince the Court that the continuing prosecution of this case by Mr. deLone, once the Third Circuit had decided the Dykes case, was in willful bad faith. See Ford, 790 F.2d at 347. First, the material facts underlying the Dykes case and Mr. Loftus's case were identical, i.e., both the Dykes plaintiff and the instant plaintiff were terminated by SEPTA for violation of SEPTA's drug and alcohol testing policies and each sought to arbitrate their grievances pursuant to the same collective bargaining agreement. Second, the legal theories advanced in Count II of the Dykes case were identical to those advanced in the instant case, i.e., each plaintiff claimed that SEPTA and Local 234 conspired to deprive him of his due process right to pursue his grievances to arbitration. Third, the Third Circuit's decision in Dykes that the claim was flawed because, under state law, Dykes had a right to petition the court of common pleas to compel arbitration, was equally applicable to the instant case. Fourth, on November, 16, 1995, nine days after the Third Circuit rendered its decision in Dykes, counsel for SEPTA sent a letter to Mr. deLone which cited Dykes and informed Mr. deLone that, based on Dykes, the claim asserted in Loftus was without legal or factual basis. Fifth, Mr. deLone knew from past experience of his duty to discontinue litigation when an intervening event had rendered the litigation frivolous because he had been previously sanctioned in this court for pursuing a case after the Third Circuit had decided a case with "uncannily parallel fact pattern and a similar litany of legal theories" in a manner adverse to Mr. deLone's case. See Morris v. Orman, 1992 WL 398363 at *5 (E.D.Pa. Dec. 31, 1992).

In his defense, Mr. deLone appears to argue that, under our adversarial system of justice, he is not obligated to bring to the court's attention developments which are adverse to his client. Mr. deLone believes that such duty rests solely with his adversaries. In Mr. deLone's words:

> its not up to me to ... stop representing my client because something happened. It's up to [opposing counsel to have brought the Dykes result to the attention of the Court], they're advocates of the other side.

(Hrg. Trscpt. at 5). Mr. deLone's view of a lawyer's obligations to the court in the face of the frivolity of his case is mistaken.

As the Third Circuit has observed: "[a]n attorney's obligation to the court is one that is unique and must be discharged with candor and with great care." Baker Industries v. Cerberus Ltd., 764 F.2d 204, 212 (3d Cir. 1985) (affirming imposition of § 1927 sanctions on counsel who failed to

comply with terms of court approved stipulation not to challenge arbitration award); see also Pennsylvania Rules of Professional Conduct Rule 3.3 (describing attorney's duty of candor to the tribunal); Pennsylvania Rules of Professional Conduct Rule 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous..."). Simply put, once Mr. Loftus's claim lost legal merit, Mr. deLone had a duty to withdraw the case. As an officer of the court, Mr. deLone was not free to press on with a meritless claim until forced to surrender by the legal artillery of his adversaries.

Mr. deLone also argues that the Third Circuit decision in Dykes did not quite render his case frivolous because he immediately sought review of the decision from the United States Supreme Court. Again, Mr. deLone is mistaken in his view of the law. At the time that the Third Circuit's decision in Dykes was announced, it became the law of the Circuit, and Mr. deLone was bound by its terms unless and until it was overturned by the Supreme Court. Allegheny General Hospital v. National Labor Relations Board, 608 F.2d 965 (3d Cir. 1979) (stating that Third Circuit decisions are binding on "all inferior courts and litigants in the Third Judicial Circuit"); Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C.Cir. 1992) (holding that circuit court decisions bind circuit "unless and until overturned by the court en banc or by Higher Authority"). In the absence of a stay, seeking discretionary review of an appellate court's decision from the Supreme Court does not license an attorney to ignore the precedential value of that decision in other pending cases, as though it had no force or effect. See Ithaca College v. National Labor Relations Board, 623 F.2d 224 (2d Cir. 1980) (holding that decision cannot be ignored simply because review is being sought).

In light of the factors cited by the Court and in view of Mr. deLone's meritless defenses, the Court concludes that by failing to concede that the result in Dykes doomed this case and by failing to withdraw it, Mr. deLone acted in willful bad faith. The result of Mr. deLone's actions was to unreasonably and vexatiously multiply the proceedings.

**B. Establishing the Amount of the Sanctions**

"Once a finding of bad faith has been made, the appropriateness of assessing attorney fees against counsel under § 1927 is a matter for the district court's discretion." Ford, 790 F.2d at 347. "To properly exercise this discretion, the district court must balance the equities between the parties" by looking to mitigating factors and the circumstances surround-

ing the case. Id. The Court "may award attorney fees whenever overriding circumstances indicate the need for such a recovery." Id. On the other hand, the Court may choose not to award attorney fees or may reduce the attorney fees awarded if, in balancing the equities, the Court determines that the interests of justice would be better served by such action. Id. at 347, n.6.

First, the Court will determine the full amount of attorney fees incurred after November 7, 1995, the date when this lawsuit was rendered frivolous by the Third Circuit's decision in Dykes. In calculating the amount of attorney fees in § 1927 cases, courts have generally applied the loadstar method. Matthews v. Freedman, 128 F.R.D. 194, 207 (E.D.Pa. 1989) (calculating attorney fees under § 1927). The lodestar is calculated by multiplying a reasonable hourly rate by the number of hours reasonably expended on the suit. Hensley v. Eckerhart, 103 S.Ct. 1933, 1939 (1983); Matthews, 128 F.R.D. at 207 (awarding attorney fees under § 1927).

In connection with their request for attorney fees under § 1988, the defendants supplied affidavits supporting their claim that the hourly rate of $150.00, which is the rate that was paid by the defendants, is the prevailing rate for defending lawsuits of this type. The defendants also submitted itemized bills to demonstrate that the time spent was reasonable. When plaintiff was afforded an opportunity to challenge the amount of the attorney fees claimed by the defendants, plaintiff generally objected to the fact that SEPTA had incurred twice as many hours of service as Local 234, however, he presented no evidence challenging the reasonableness of either the hourly rate charged or the amount of hours spent by defendants' counsel in this matter.[6]

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[6]Plaintiff made the general objection to attorney fees when responding to defendants' motion for attorney fees under 42 U.S.C. 1988. Mr. deLone did not raise any objections to the reasonableness of the attorney fees in memoranda relating to the Rule to Show Cause Order issued upon him.

Therefore, based on evidence presented by the defendants and in the absence of evidence to the contrary presented by Mr. deLone, the Court concludes that both the hourly rate and the amount of hours spent by defense counsel are reasonable. See Hicks v. Arthur, 891 F. Supp. 213, 216 (E.D.Pa. 1995) (finding amount billed reasonable in absence of opposing evidence).

Applying the loadstar method to the figures provided by defendants, the Court concludes that, after November 7, 1995, SEPTA's counsel expended 101.8 hours on the case. At a rate of $150.00 per hour, SEPTA incurred attorney fees in the amount of $15,270.00. As for Local 234, after November 7, 1995, its attorney expended 55.3 hours causing Local 234 to incur $8,295.00 in attorney fees. The combined total of attorney fees incurred by the defendants is $23,565.00.

Next, the Court turns to an analysis of the mitigating factors and circumstances surrounding this case to determine the proper amount of sanctions. In § 1927 cases, district courts are granted wide discretion in ascertaining an appropriate sanction. Ford, 790 F.2d at 347. The court is not required to impose sanctions on Mr. deLone simply because the defendants have demonstrated that they incurred attorney fees. Nor should a sanction be imposed that is greater than necessary to achieve the public policy objectives underlying the statute. In the final analysis, the Court is called upon to balance the equities to determine what sanction will best serve the interests of justice. Id. at 347, n.6. While Mr. deLone did not offer any financial evidence of the nature of his practice, the Court will consider the fact that Mr. deLone is a sole practitioner whose practice is primarily dedicated to representing plaintiffs in civil rights actions. The Court will also consider the in terrorem impact a large award in this case could have on other civil rights counsel who may prematurely abandon meritorious but novel claims for fear that, if unsuccessful, counsel could face financial ruin. Balancing the equities, and in light of the public purpose to be served by imposing § 1927 sanctions, the Court will exercise its discretion and impose a sanction of $4,000 to be divided equally between the defendants. Payment shall be made within ten days of the date of this Memorandum.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| FRANCIS J. LOFTUS, | : | CIVIL ACTION |
| | : | NO. 93-2471 |
| Plaintiff, | : | |
| | : | |
| v. | : | |
| | : | |
| SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, ET AL. | : | : |
| | : | |
| Defendants. | : | |

ORDER

**AND NOW,** this **7th** day of **May, 1998,** following a rule to show cause hearing on February 27, 1998, and upon consideration of memorandum by H. Francis deLone, Jr., Esq. in response to the Court's Order to Show Cause (doc. no. 72), SEPTA's memorandum of law on the issue of possible sanctions against Mr. deLone (doc. no. 78), Local 234's letter and memorandum dated March 9, 1998, and response to defendants' memos by Mr. deLone (doc. no. 79), it is hereby **ORDERED** that, for the reasons set forth in the Court's Memorandum of this date, H. Francis deLone, Jr., Esq. shall pay SEPTA and Local 234 $2,000.00 each to compensate them for attorney fees incurred after November 7, 1995. it is **FURTHER ORDERED** that payment shall be made within ten days of the date of this Order.

**AND IT IS SO ORDERED.**

EDUARDO C. ROBRENO, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 98-1114/98-1435/98-1530/98-1664

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FRANCIS J. LOFTUS,

Appellant

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY;
TRANSPORT WORKERS UNION OF PHILADELPHIA, LOCAL 234,
TRANSPORT WORKERS UNION OF AMERICA/AFL-CIO

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SUR PETITION FOR REHEARING

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Present: BECKER, Chief Judge, SLOVITER, STAPLETON, MANSMANN,
GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, LEWIS,
McKEE, RENDELL, Circuit Judges, and SCHWARTZ, District Judge*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc,

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*As to panel rehearing only.

the petition for rehearing is denied.

By the Court,

_____

Circuit Judge

## CONFLICTS WITH DECISIONS OF THIS COURT AND THE SUPREME COURT

### A. Conflict with Wright v. Universal Machine Service Corp.

In *Wright v. Universal Maritime Service Corp.*, _____ U.S. _____ , 119 S.Ct. 391,394-96 (1998), discussing two lines of Supreme Court cases on the subject of arbitration, the Supreme Court stated:

> The first is represented by *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), which held that an employee does not forfeit his right to a judicial forum for claimed discriminatory discharge in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*, if "he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement." 415 U.S., at 49, 94 S.Ct. 1011. In rejecting the argument that the doctrine of election of remedies barred the Title VII lawsuit, we reasoned that a grievance is designed to vindicate a "contractual right" under a CBA, while a lawsuit under Title VII asserts "independent statutory rights accorded by Congress." *Id.*, at 49-50, 94 S.Ct. 1011. The statutory cause of action was not waived by the union's agreement to the arbitration provision of the CBA, since "there can be no prospective waiver of an employee's rights under Title VII." *Id.*, at 51, 94 S.Ct. 1011. We have followed the holding of *Gardner-Denver* in deciding the effect of CBA arbitration upon employee claims under other statutes. See *McDonald v. West Branch*, 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed.2d 302 (1984) (claim under 42 U.S.C. § 1983); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981) (claim under Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*). ...
>
> [W]hether or not *Gardner-Denver's* seemingly absolute prohi-

bition of union waiver of employees' federal forum rights survives *Gilmer* [*v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)], *Gardner-Denver* at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA.

The Supreme Court then reversed the Fourth Circuit's judgment, a judgment which had affirmed the lower court's order granting summary judgment to defendants on the ground that the plaintiff had failed to pursue the applicable collective-bargaining agreement grievance procedure before pursuing a lawsuit in federal court under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. 119 S-Ct., at 394 & 397. The Supreme Court reasoned that "the collective-bargaining agreement in this case does not contain a clear and unmistakable waiver of the covered employees' rights to a judicial forum for federal claims...." 119 S.Ct., at 397.

In direct conflict with *Wright*, the panel held that plaintiff was required to seek arbitration before he could pursue a lawsuit in federal court under 42 U.S.C. § 1983 asserting that defendants deprived him of property (his job)[2] without due process of the law. Specifically, the panel stated:

> Similarly, Loftus' argument that "the Supreme Court has held that individuals have the right to have the courts, rather than grievance/arbitration panels, resolve issues raised in actions asserting claims under 42 U.S.C. § 1983 and various other statutes" is not germane.[3] Loftus bases his § 1983 claim on the argument that he did not receive all the process which he was due in those hearings. This is not the issue the arbitration panel would have had before it. Neither the District Court's decision granting summary judgment in this case nor our decision in *Dykes* suggests Loftus must arbitrate whether the grievance process was fair. Rather,

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[1] The parties do not dispute that plaintiff was employed by a public agency, SEPTA, could only be discharged for cause, and therefore had a property interest in his job. 3

[2] In making this argument, plaintiff cited *McDonald v. City of West Branch*, 466 U.S. 284 (1984); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); and Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), three cases on which the Supreme Court heavily relied in deciding *Wright*.

**Loftus must first seek arbitration before he can claim he was denied due process.**

Panel Slip Opinion, Exhibit A hereto, at 12 (emphasis and footnote added). Significantly, neither the panel nor the District Court stated or even suggested that the collective-bargaining agreement in this case contained a clear and unmistakable waiver of plaintiff's right to a judicial forum for his federal claims. Instead, in direct conflict with the Supreme Court's holding in *Wright*, they both held that plaintiff was barred from pursuing his § 1983 claims in federal court because he had not pursued a state court proceeding designed to compel arbitration.[4]

**B. Conflict with *Simmerman v. Corino* and *In Re Tutu Wells Contamination Litigation***

Under the controlling precedent of this Court's decision in Simmerman v. Corino, 27 F.3d 58 (3d Cir. 1994), the lower court's imposition of sanctions more than three months after the entry of final judgment was untimely, an abuse of discretion, and invalid. In Simmerman, this Court reasoned:

> Although the court has both the authority and the duty to assure compliance with the requirements of [Fed.R.Civ.P. 111, we find that the court abused its discretion in imposing sanctions on its own initiative more than three months after it had disposed of the underlying case, In [*Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90 (3d Cir. 1988)], we adopted a supervisory rule to guide the courts and the parties on the appropriate timing for the filing and consideration of Rule 11 motions .... [W]e held that .counsel seeking Rule 11 sanctions must file their motions before the entry of final judgment in district court." *Pensiero*, 847 F.2d at 92....

The logic of Pensiero applies equally to *sua sponte* consideration of sanctions by the district court. There we emphasized the

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4 To the extent that the panel's decision imposes an exhaustion of remedies requirement on the pursuit of § 1983 claims, it is also in conflict with the Supreme Court's holdings in *Ellis v. Dyson*, 421 U.S, 426, 432-33 (1975); *Allee v. Medrano*, 416 U.S. 802, 814 (1974); and *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

> the law, as outlined in *Dykes*, defendants are entitled to judgment as a matter of law. Therefore, summary judgment is granted in favor of the defendants. Having reached this conclusion, the Court need not address the first basis for summary judgment presented by defendants....
>
> Because there is no genuine issue of material fact as to whether plaintiff requested a court of common pleas to order arbitration, and because under the teachings in *Dykes*, defendants are entitled to judgment as a matter of law, summary judgment must be entered in favor of the defendants.

(January 14, 1998 Order, Exhibit A to this Brief, footnote 1)

**B. Conflict Between the Lower Court's Decision and Supreme Court Decisions**

This Court would not and does not have the authority to issue an opinion that is in conflict with a decision issued by the Supreme Court. The lower court, however, has erroneously interpreted the *Dykes* decision in a way that would put that decision in direct conflict with several Supreme Court decisions.

First, the District Court's holding that plaintiff was required to seek a state court order compelling arbitration before seeking relief under § 1983 is in direct conflict with Supreme Court decisions holding that a plaintiff is not required to exhaust all possible state remedies before bringing a § 1983 action. See, e.g., *Ellis v. Dyson*, 421 U.S. 426, 432-33 (1975); *Allee v. Medrano*, 416 U.S. 802, 814 (1974); *Monroe v. Pape*, 365 U.S.167, 183 (1961).

Further, the lower court's holding that, without full consideration of the facts, summary judgment could be entered against plaintiff on his due process claim because as a matter of law the labor grievance proceedings were sufficient to accord him adequate procedural due process is in conflict with the Supreme Court's holding in *Dennis v. Sparks*, 449 U.S. 24 (1980) that plaintiffs stated a valid cause of action for a denial of procedural due process in state court proceedings when they alleged that a state court injunction had been issued as a result of a conspiracy between private parties and a state court judge. Similar

logic was applied by the Seventh Circuit in *Parratt v. City of Connersville, Ind.*, where the Court of Appeals, affirming a judgment for a plaintiff who had been unsuccessful in his pursuit of a grievance but successful in court, held that " the problem here is not that the union grievance machinery ... is inherently inadequate, for it is not, but that **as administered in the present case** it could not protect the plaintiffs property right in his job as a police officer." 737 F.2d at 697 (emphasis added)

As previously noted, in granting summary judgment to defendants, the court failed to consider whether there was sufficient evidence to allow a jury to find that, as plaintiff asserted, there was a conspiracy between defendants pursuant to which "SEPTA and Local 234 corrupted or made a sham of the grievance process associated with plaintiffs discharge...." (January 14, 1998 Order, Exhibit A to this Brief, p.2, footnote 1) This failure was critical to the lower court's failure to appreciate the factual differences between this case and the *Dykes* case. The failure also led to the lower court's failure to realize that its interpretation of the *Dykes* decision was in direct conflict with the Supreme Court's decision in *Dennis v. Sparks*.

There is no need to review all of plaintiffs evidence to show the gravity of the lower court's failure to consider such evidence in its consideration of defendant's summary judgment motions. A few examples will do. First, plaintiff notes that John Ropars, a vice-president of Local 234, admitted in an affidavit that under the applicable collective bargaining agreement '[a]n arbitration hearing [of a grievance] takes place

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before a tri-partite panel, which includes one representative of SEPTA, one representative of Local 234, and one neutral arbitrator." (Aff. of John Ropars, Jr., I 11, A 853) Given the fact that the defendants, SEPTA and Local 234, could control the outcome of any grievance arbitration and plaintiffs assertion that these two entities had conspired against him to deprive him of due process of the law, there can be no logical basis for the District Court's holding that plaintiff had to go through the process of obtaining a court order compelling the conduct of an arbitration already doomed to failure as a prerequisite to pursuing a § 1983 action.

Another crucial fact overlooked by the lower court was the fact that SEPTA's drug testing program expressly provided that an employee who questioned the validity of a reportedly positive result in a test conducted by SEPTA to detect the presence of alcohol or controlled substances had a right to have a confirmatory test performed by an accredited, independent laboratory (SEPTA's Integrated Program of Education, Assistance, and Testing for Intoxicants and Controlled Substances, ¶ 15(b), A 798), and that SEPTA rejected plaintiffs request to have such testing done (Aff. of F. Loftus, ¶ 16, A 771-72). These facts are quite different than the ones considered by this Court in Dykes, where this Court held that "pursuant to the collective bargaining agreement, whether reasonable suspicion [to conduct drug testing] exists in a given case is not a question of law under the Fourth Amendment, but is instead a question of fact to be resolved during the course of the grievance/arbitration process." 68 F.3d at 1565. There is a clear difference between a consideration of what process is due an individual to determine a factual question that can only be resolved during the course of the grievance/arbitration process, which was the consideration undertaken by this Court in Dykes, and a consideration of what process is due an individual to determine if he was denied a right to which he was entitled under express provisions of a drug and alcohol testing program, which is the consideration that should have been undertaken in this case. The denial of this right was important since, as Arthur Brown-a SEPTA management employee- admitted during his deposition, SEPTA is required to follow the procedures in its drug and alcohol testing program, and if it fails to do so, then the test it conducted without using proper procedures is considered invalid and is not grounds for discharge. (Dep. of A. Brown, at 16-17, A841-42)

The lower court's summary judgment holding is also in direct conflict with several decisions in which the Supreme Court has held that individuals have the right to have the courts, rather than grievance/arbitration panels, resolve issues raised in actions asserting claims under 42 U.S.C. § 1983 and various other federal statutes. See, e.g., McDonald v. City of West Branch, 466 U.S. 284 (1984); Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981); Alexander v. Gardner-Denver Co., 415 U.S. 36(1974).

In the unanimous decision in McDonald, the Court explained the logic behind these holdings as follows:

> Our rejection of a rule of preclusion in Barrentine and our rejection of a rule of deferral in Gardner-Denver were based in large part on our conclusion that Congress intended the statutes at issue in those cases to be judicially enforceable and that arbitration could not provide an adequate substitute for judicial proceedings in adjudicating claims under those statutes. 450 U.S,, at 740-746; 415 U.S., at 56-60. These considerations similarly require that we find the doctrines of res judicata and collateral estoppel inapplicable in this § 1983 action.

466 U.S., at 289.

Explaining further, the Court then held:

> [A]n arbitrator's expertise 'pertains primarily to the law of the shop, not the law of the land,' *Gardner-Denver*, supra, 415 U.S.,at 57. An arbitrator may not, therefore, have the expertise required to resolve complex legal questions that arise in § 1983 actions.
>
> Second, because an arbitrator's authority derives solely from the contract, Barrentine, supra, 450 U.S., at 744, an arbitrator may not have the authority to enforce § 1983.... Indeed, when the rights guaranteed by § 1983 conflict with provisions of the collective bargaining agreement, the arbitrator must enforce the agreement, *Gardner-Denver*, 415 U.S., at 43.
>
> Third, when, as is usually the case, the union has exclusive control over the 'manner and extent to which an individual grievance is presented,' *Gardner-Denver*, supra, 450 U.S., at 58, n. 19, there is an additional reason why arbitration is an inadequate substitute for judicial proceedings. The union's interest and those of the individual employee are not always identical or even compatible, As a result, the union may present the employee's grievance less vigorously, or make different strategic choices, than would the employee. See Gardner-Denver, 58, n. 19, *Barrentine*, supra, 450 U.S., at 742. Thus, were an arbitration award accorded preclusive effect an employee's opportunity to be compensated for a consti-

> tutional deprivation might be lost merely because it was not in the union's interest to press his claim vigorously.

466 U.S., at 290-91.

An individual does not receive the careful consideration that he or she deserves where, as here, a courtwithout a full consideration of the facts-decides that the individual is precluded as a matter of law from obtaining careful judicial review of a claim brought under § 1983 because he did not first seek a state court order compelling a meaningless arbitration hearing.